

Consumer Electronics Retailers Coalition
Best Buy, Circuit City, Good Guys, IMRA, NARDA, NRF,
RadioShack, Ultimate Electronics

April 30, 2002

VIA ECFS

Mr. William F. Caton
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

**Re: *Ex Parte* Presentation; Commercial Availability of Navigation Devices,
 CS Docket 97-80**

Dear Mr. Caton:

This is to notify the Office of the Secretary that on April 29, 2002, the Consumer Electronics Retailers Coalition ("CERC") made *ex parte* presentations to Commissioner Abernathy and Advisor Stacy Robinson; Commissioner Copps and Advisor Catherine Bohigian; Commissioner Martin and Advisor Suzanna Zwerling; Susan Eid, Advisor to Chairman Powell; and Kenneth Ferree, head of the Media Bureau. Attendees on behalf of CERC included W. Alan McCollough, President and CEO, and W. Stephen Cannon, Senior Vice President and General Counsel, Circuit City Stores, Inc.; Joe D. Edge and Jennifer L. Blum, counsel to RadioShack Corporation and CERC; and the undersigned, counsel to Circuit City and CERC.

CERC has attached a copy of a written presentation that discloses the matters discussed during the meetings. In the meetings, emphasis was given by the CERC presenters to the issue of exclusive reliance, in devices that MSOs lease or sell to consumers, on the technical standards and the licensing terms that are offered by MSOs and/or CableLabs to competitive entrants, by a date certain (1-1-2003). CERC argued that only through such common reliance on a common set of standards and licensing terms could potential competitive entrants develop sufficient confidence in MSO intentions and support to develop entrant products that would rely on standards written, for the entrants' use, by the incumbent device distributors. The CERC attendees requested Commission action on the proposed amendment to rules section 76.1204(a)(1), first offered by Circuit City and RadioShack in a joint *ex parte* filing in this Docket on April 16, 2001, as part of the Commission's "Year 2000 Review" in this Docket. The CERC attendees urged prompt Commission action on this amendment, pursuant to the Review proceeding.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter is provided to your office. A copy of this notice has been sent to the Commission employees listed above.

Very truly yours,

/s/ Robert S. Schwartz

Robert S. Schwartz

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Briefing Re 'Navigation Devices' & DTV Transition
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CERC Briefing For FCC Commissioners

Six years ago Congress passed Section 304 of the 1996 Telecommunications Act, requiring the Commission to **assure** the competitive commercial availability of any device necessary to receive any service offered by a Multichannel Video Program Distributor.

Four years ago the Commission issued its regulations in CS Docket 97-80, requiring cable MSOs to support the attachment and functioning of digital cable-ready navigation devices, including DTV receivers. **July 1, 2000** was established as a deadline for cable MSOs to support the attachment and operation of digital cable-ready navigation devices (including DTV receivers and other multifunction products). But --

- No competitive entry has occurred.
- No sanctions have been imposed on the MSOs.
- No additional action has been taken by the FCC, despite a pending "Year 2000 Review," proposals by CERC and others, and mounting congressional concern.

What the Commission Needs To Do Now:

- On April 16, 2001, CERC members formally proposed an amendment to navigation device regulations to require that MSO devices **rely on the same technical specifications as are made available to competitive entrants**. The Commission has set competition back a year in failing to act on this still-pending proposal.
- Manufacturers cannot get to market without signing the much-criticized **"PHILA" license** -- an immovable obstacle for two years. Where incumbent monopolists can insist on licensing their own potential competitors, abuse is inevitable. The FCC has jurisdiction and must exercise it to insist on a fair and expeditious outcome that protects consumers who have already purchased DTV displays.
- The Commission should act on pending proposals to end specific discrimination against competitive entrant products as to **technical standards, product certification, and consumer subsidies**.

Why Vendors Still Cannot Offer

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OpenCable Reliant Products

When the FCC was formulating its 1998 regulations, NCTA and CableLabs offered to devise specifications to support entrants' right to attach. The FCC accepted their offer, subject to review in the year 2000. The Commission set 2005 as the date for reliance by MSO leased devices on standards developed for competitive entrants, subject to possible acceleration if competition did not bloom.

Since 1998 Cable MSOs have leased 25 million boxes to consumers without relying on any of the specifications they are developing for competitive entrants. Meanwhile, these potential entrants have suffered through ever-shifting obstacles, and are no closer to coming to market than they were in 1998. Manufacturers lack faith or reliance that the operation of their products will be supported on cable systems, and are being blocked from performing adequate testing or achieving necessary product certification:

- ***The "OpenCable 2000" specification*** -- CableLabs and NCTA assured the Commission that their first set of specifications were adequate to meet the industry's July 1, 2000 attachment obligations. But, having given this assurance, CableLabs now (1) refuses to finish testing or consider necessary modifications, and (2) insists that ***compliance with this standard alone is insufficient***, and the additional, unfinished "OCAP" standard must also be included in any certified product.
- ***The "OCAP" specification*** -- the ultimate hope for devices that are the equal of MSO-leased devices. MSOs still refuse to commit to relying on this specification in their own leased products -- even when the request comes from the Chairman of the Senate Antitrust Subcommittee. It discriminates against competitive, multi-function products, and to imposes ***"selectable output control"*** and down-resolution on consumers. Manufacturers see it as at least three years away from implementation in products.
- ***The "PHILA" license*** -- after two years, no consumer electronics manufacturer has signed it. Under Congressional pressure its terms have been made public, and then, recently, harshly criticized by Members of the House Commerce Committee.

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Problems With The First, "J2K" Specification

The "July 2000" specification was cited to the FCC as compliance with FCC rules, but it **appears CableLabs has withdrawn cooperation from manufacturers as to this specification.** Though this specification will not support fully interactive, portable operation of products, some manufacturers hope to use it as the basis for innovative, multi-function products that differ in other ways from the leased offerings of MSOs. But:

- CableLabs now has told a manufacturers that reliance on this specification is *not* adequate for certification of a new product.
- Crucial testing, requested by manufacturers, has not been performed by CableLabs.
- Manufacturer requests for small changes, so as to enable Impulse Pay Per View ("IPPV") through competitive products, have been pending for years but not performed.
- CableLabs certification fees and requirements are arbitrary and unreasonable; no path is offered toward self-certification.

What The FCC Can Do To Cure Them

In finally acting in its "Year 2000 Review," the FCC should:

- Insist that compliant products be testified and certified for use, or impose sanctions for failure to meet the July 1, 2000 deadline.
- Review and oversee the OpenCable testing and certification program -- the power to set specifications to comply with the FCC regulations in this Docket was delegated to CableLabs by the FCC.
- Require that pending enhancements requested by manufacturers be implemented.
- Establish priority deadlines for CableLabs support of non-OCAP navigation devices, as standalone products, and bases for later "stepup" OCAP models. Enable competitive entry, at last.

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Problems With The More Advanced "OCAP" Specification

The "middleware"-based "Open Cable Access Platform" ("OCAP") could establish a level playing field for all products. Yet now that OCAP versions 1.0 and 2.0 are public, manufacturers point to serious discrimination against multi-function products. They also believe it will be years before a reliable specification will be available:

- A "middleware" solution should support both downloaded applications, and applications native to the multi-function device. OCAP, however, provides for a "monitor" application that **restricts or disallows functions or features resident in the device** -- as if a web browser disabled many or most PC functions. (Similar to the monopolization alleged re Microsoft as to Netscape, but from the "headend" rather than the "operating system" side.)
- When a device-supplied application, such as a program guide, is allowed to run, it might not be supported because in some respects MSO systems are still designed for proprietary protocols only.
- OCAP will not be deemed reliable by manufacturers until stable, and devices distributed by cable MSOs **also** rely on it. **Reliability** in consumer hands, in a new product category, is a huge issue for consumer electronics manufacturers -- consumers will accept a PC that locks up several times a day, but not a home entertainment unit that does so.

What The FCC Can Do To Cure Them

In its Year 2000 Review the FCC should:

- Adopt CERC's pending proposed amendment to require by **January 1, 2003**, that MSO devices **rely on the set of specifications made available to competitive entrants**. Otherwise, CableLabs can keep these specifications in a perpetual state of unreliability.
- Require that the OCAP specification **abandon selectable output control and "downresolution,"** and **not discriminate** against competitive, integrated products, such as multi-function set-top boxes and DTV receivers.

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Problems With The PHILA License

CableLabs offered to the FCC in 1997 to devise a specification to address security obstacles, to comply with Section 304. The "POD-Host Interface" puts MSO security functions in the "POD" module, and all non-MSO specific functions in the competitive "host." MPAA later requested that security measures also be imposed across the POD-Host interface -- requiring that competitive devices be licensed to decrypt signals. CableLabs has molded this delegation of FCC implementation into a monopolist's contract of adhesion, so as to:

- over-reach as to licensees' IP (e.g., grant-back), require mandatory adherence to **all** CableLabs specifications, and impose unreasonable liability on entrant manufacturers;
- through OCAP, impose **selectable output control and signal downresolution**, and copy control in ways not required of MSO-leased devices **and now repeatedly disclaimed by the motion picture industry**;
- until recently giving in to congressional and FCC pressure, demanding of potential licensees a "non-disclosure agreement." Once a current draft became available, Members of Congress reacted strongly to the "downresolution" and "selectable output control" provisions. The latter have been disclaimed and disavowed by the MPAA and major studios, but -- although CableLabs insist they are there only at motion picture industry request -- remain in the current draft license.

What The FCC Can Do To Cure Them

- The stalemate as to PHILA can be broken only by the FCC acknowledging that (1) CableLabs, in offering PHILA, is fulfilling a trust originating in the Congress and delegated by the FCC, and (2) the issues it raises are every bit as much of public concern as was the RJ11 license when telephone equipment was deregulated.
- CableLabs cannot claim antitrust immunity for exercising a delegated power in the license, yet disclaim any public responsibility for its terms. Resolving PHILA as a public trust should be a top FCC priority.

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It Is Past Time For the FCC To Act

It is particularly galling that NCTA and incumbent cable MSO suppliers continue to suggest that retailers have been offered "competitive" products but failed to respond. Consumer electronics retailing is perhaps the most competitive business on earth. Does it make sense that all retailers, large and small, national and regional, CERC and non-CERC members, would refuse to buy saleable OpenCable-reliant products if any were available?

Since issuing regulations in 1998, the Commission has failed to hold the cable industry accountable for clear, documented failures, refusals, and evasions. Had retailers known that the oversight promised by the FCC would not occur, we may not have supported the delegation of so much public responsibility to cable MSOs and to CableLabs.

While many positive links toward competition have been forged, **a chain with 99 good links and one broken one still cannot be relied on for support.** The FCC has never required that all links be sound. Until it does, reliance on CableLabs good faith by product manufacturers still seems a distant goal.

CERC's pending amendments address the major disincentives to forging reliable support for innovative, multi-function DTV products, including set-top boxes and other devices:

(1) Require MSO products also to rely on the OpenCable suite of specifications by 2003 -- **so as finally to provide MSOs with an incentive to assure their reliability.**

(2) Stop officially discriminating against competitive entry -- allow a leased box customer to choose a POD-enabled set-top box, DTV product, or other multi-function device **without losing his or her "analog neighbor subsidy."**

Additionally, there are glaring obstacles to competitive entry that a determined FCC must sweep away through oversight:

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(a) PHILA must be resolved in good faith, rather than as a monopolist's take-it-or-leave-it price for executing a public trust.

(b) CableLabs must establish reasonable, non-arbitrary product certification policies, leading to self-certification.

(c) The "OpenCable 2000" specifications must be completed rather than abandoned by CableLabs.

(d) The OCAP specification must be rid of discrimination against non-MSO, multifunction devices.

CERC's Continuing Offer

CERC is willing to meet at any time, in the presence of cable representatives, to help the Commission define, discuss, and accomplish these objectives.